IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 819 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

No.1 Yes, No.2 Yes (only para 9 & 10)
Nos.3 to 5 :No

HARGOVAN KESHAV

Versus

MANSING THAKORBHAI

Appearance:
MR SK JHAVERI for Petitioner
MR JD AJMERA for Respondent No. 1
NOTICE SERVED for Respondent No. 4, 5, 6

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 03/03/2000

ORAL JUDGEMENT

1. The appellant- defendant no.4 of Special Civil

Suit No. 63 of 1971 has challenged the judgment and decree dated 29th December 1978 passed by the learned Civil Judge, Senior Division, Surat, declaring that survey no. 393 of Mota Village admeasuring 1 Acre 2 Gunthas, Gamtal Tukda No. 28 of Mota Village admeasuring 6 Gunthas and Building No. 3/121 of Mota village and building No. 3/122 of Mota village are the joint family properties of families consisting of plaintiff no.2 Mansing Thakor, plaintiff no.3 Manilal Thakor (respondents no. 1 and 2 herein), defendant no.2 Magan Bhikha Kara and defendant no.3 Bhagatsing Magan Bhikha, respondents no. 5 and 6 herein. The learned trial judge further held that the plaintiff Mansing Thakor and Manilal Thakor are jointly entitled to 1/2 share from the said properties and defendants Bhagatsing Magan and Magan Bhikha are jointly entitled to 1/2 share from the said properties. The learned trial judge, therefore, declared that the appellant is not the rightful owner of survey no. 393 admeasuring 1 Acre 2 Gunthas of Mota village and he should hand over the possession to the present plaintiffs and defendants no. 2 and 3. It was further decreed that the house no.3/121 should be handed over to plaintiffs no. 2 and 3 jointly and house no.3/122 should be handed over to defendants no. 2 and 3 jointly. It was decreed that the plaintiffs and defendants no. 2 and 3 are entitled to mesne profits from survey no. 393 from 8.2.1965.The learned trial judge ordered to draw the preliminary decree accordingly.

2. The brief facts giving rise to the present appeal are as under:-

The plaintiff no.1 Thakorbhai Bhikhabhai who is the father of plaintiffs no. 2 and 3 and defendants no. 2 and 3 form a joint Hindu family and one Bhikha Kara who expired in 1953 A.D. was the head of the family. During the life time of said Bhikha Kara, he had executed a will dated 29th July 1946 and one codicil dated 24th June 1953. As per the said will,the deceased Bhikha Kara declared the plaintiff and defendants no. 2 and 3 as his legatees and particularly for the properties situated in India, deceased Bhikha Kara had appointed as executors plaintiff no.1 Thakorbhai Bhikha and another executor. The deceased Bhikha Kara had also appointed another administrator for his property situated at Africa and as per that will, the executors had to manage the said properties till the plaintiff no.3 Manilal Thakor attained the age of 16 years and thereafter the executors were debarred from management of the said properties. However, as they have still continued the management, both the executors are also joined in the present suit.

It is the further case of the plaintiffs that as per the will of Bhikha Kara, all the plaintiffs and defendants no. 2 and 3 are entitled to 3/5th share each as the plaintiff no.3 Manilal Thakor had completed the age of 16 years. It is the further case of the plaintiffs that as Manilal Thakor is permanently residing in the foreign country, the plaintiff no.1 is entitled to take possession of all the properties as mentioned in the will and so the plaintiffs no.1,2 and 3 are jointly entitled to recover their 3/5th share and the defendants no. 2 and 3 are entitled to recover 2/5th share from the said properties. The plaintiff no.1 and the plaintiff no.4 who were the executors of the said properties are entitled to take possession of the said properties. It is the further case of the plaintiffs that the plaintiff no.1 Thakorbhai Bhikha came to India in the year 1957 A.D. from Africa and he wanted to go back to South Africa and,therefore,in favour of defendant no.1, who was related to the plaintiff no.1, he passed a general power of attorney for the properties mentioned in Schedule A attached to the plaint to manage the said properties and he gave the possession of the said properties to defendant no.1 and since then, the defendant no.1 was managing the said properties as general power of attorney holder of plaintiff no.1. It is the case of the plaintiffs that the defendant no.1 had not given the accounts of the said properties,but from the properties mentioned in Schedule A, the defendant no.1 gave possession of certain portion of the properties situated on the north side to plaintiff no.1. However, he did not give possession of other properties. Therefore, the present suit is filed. It is the further case of the plaintiffs that they had demanded accounts regarding the management of the said properties and also the possession of the properties as mentioned in Schedule A from the defendants, but he failed to give the said account and possession of the said properties and so on 22nd December 1969, they cancelled the general power of attorney of defendant no.1. Necessary advertisements were also published in the newspapers for cancellation of the said power of attorney.On the basis of the general power of attorney given by the plaintiff no.1 to his son on 29th October 1969 and on the basis of the said general power of attorney, the plaintiff no.2 demanded possession of the properties from the defendant no.1 and also the accounts, but the defendant no.1 failed to give the possession as well as the accounts and, therefore, the plaintiffs filed a suit in the Court of learned Civil Judge, Senior Division, Bardoli against the defendant no.1 for submitting accounts from 1957 upto the date of filing of the suit.It is the further case of the

plaintiffs that the notice was given to the defendant no.1 to hand over the possession of the said properties to the present plaintiffs as defendants no. 2 and 3 had not shown willingness to join the plaintiffs, the present suit is filed against the defendant no.1 and the defendants no. 2 and 3. The plaintiffs apprehended that the defendants no. 2 and 3, in collusion with the defendant no.1 will defeat the claim of the plaintiffs and,therefore, the present suit is also filed for partition of the said properties and they have claimed jointly 3/5th share from the said properties. The plaintiffs have claimed that they had sent Rs. 48000/to defendant no.1 from Africa and from the said amount, the defendant no.1 has purchased the properties mentioned in Schedule B and the plaintiffs and defendants no. 2 and 3 are the owners of the said properties. It is the further case of the plaintiffs that the defendant no.1 had purchased the said properties as 'Benamidar' and, therefore, sought for a declaration that he is a 'Benamidar' of the said properties. The said claim is also filed in the present suit. It is the further case of the plaintiffs that the defendant no.1 had sold survey no. 393 mentioned in Schedule A to Hargovind Keshav , the appellant herein and the said sale is not binding to the plaintiffs and the defendants no. 2 and 3 and that declaration is also claimed by the plaintiffs in the present suit. So, the defendant no.4 is also joined in the present suit. Thus, the plaintiffs have claimed possession of the properties mentioned in Schedule A except the serial no.1 jointly with the defendant no.2 and defendant no.3 as owners. The plaintiffs have also sought for a declaration that the property mentioned in Schedule B which is in possession of defendant no.1, he is a'Benamidar' of the property and that plaintiffs and defendants no. 2 and 3 are the joint owners of the said properties and also for possession to the plaintiffs and the defendants no. 2 and 3. Alternatively, it was prayed that the partition of the properties mentioned in Schedule A and B should be done and plaintiffs be given their joint portion as 3/5th share from the said properties. A further declaration was sought that sale of survey no. 393 mentioned in Schedule A is not binding to the plaintiffs and the defendants no. 2 and 3. Mesne profits of the properties mentioned in Schedule A and B from the defendant no.1 and the costs of the suit were also prayed for.

3. The defendant no.1 in his written statement Ex. 31 inter alia contended that the defendant no.3 Bhagatsinh Magan and Bhikha Kara brought him in the year 1953-54 to Mota village and at that time, Bhagatsinh was

in possession of survey no. 303 and 306/1 and he handed over the possession of the said lands to him. He has further stated that the general power of attorney was given not only by Thakorbhai but Thakorbhai and Bhagatsinh Magan jointly gave the general power to defendant no.1. He has further stated that the possession of the said land was not given in the capacity of a general power of attorney holder, but it was given to him as a tenant and survey no. 303, 306/1, 493, 494, 306/2 of these lands were given to him as a tenant and thereafter by law, the lands have been sold to him and none of the plaintiffs took any objection. Alternatively, he has stated that he is a tenant of the said land and, therefore, the said questions can be decided by the Mamlatdar in the Tenancy Court and till that time, this Court will have no jurisdiction to hear the suit. He has challenged the authority of the plaintiffs to cancel the power of attorney given to him. He has denied the fact that amount of Rs. 48000/- was received by him from the plaintiffs and that he purchased any land from the said amount. According to him, he is the rightful owner of the properties mentioned in the Schedule and he is not a 'Benamidar'. He has stated that the survey no. 393 was of inferior quality and so the said land was sold with the consent of defendants no. 2 and 3 and from the sale proceeds, survey no. 306/2 was purchased and rest of the land was given to the plaintiff's daughter Bai Mangi and so also, the suit is liable to be dismissed.

4. The defendants no.2 and 3, in their written statement at Ex. 38, inter alia pointed out while admitting their relations with the plaintiffs that the plaintiff no.1 and defendant no.2 are entitled to get half share from the properties of Bhikha Kara and so the partition should be done accordingly. They have disputed the execution of the will by Bhikha Kara. It is their case that if the will is proved to have been executed, then it was not a valid will as it was not executed in a sound mental condition. As per their say, the defendant no.1 was cultivating the land before 1957 A.D. as an agriculturist on crop sharing basis. According to them, the properties purchased by the defendant no.1 are purchased from his personal earnings or by the debt incurred by him and so the plaintiffs have no right or share in the properties in question and,therefore, the facts narrated in the plaint are denied.

5. The defendant no.4,in his written statement at Ex. 30, has inter alia stated that he is falsely involved in the suit and the suit cannot proceed against

him legally. He is a bonafide purchaser of survey no. 393 of Mota village and in the Government record, the said land is transferred in his name and the plaintiffs cannot demand the said land from him. Alternatively, he has contended that he is the tenant of the suit land because the land was handed over to him by the general power of attorney holder of the present plaintiffs and till that point is decided, this Court has no jurisdiction to hear the suit and the matter be referred to Mamlatdar, Bardoli.

6. On the basis of the pleadings, the learned trial judge raised issues at Ex.40. On behalf of the plaintiffs,the plaintiff no.2 has been examined at Ex. 165 and one Jivansing Bhagwansing is examined at Ex. 184. On behalf of the defendants, neither any witness has been examined nor the defendants no. 1 to 4 elected to step into the witness box. The learned trial judge, after examining the oral as well as documentary evidence, recorded a finding that the plaintiffs have failed to prove that Bhikha Kara executed a will dated 29th July 1946 and codicil dated 24th June 1953 and that he had the right to dispose of the property by will and codicil. The learned judge also recorded a finding that it is also not proved that the plaintiff no.1 had authorised the defendant no.1 by a power of attorney and entrusted him with the possession of properties mentioned in Schedule-A for their management and out of these properties, the possession of one house was handed over by the defendant no.1 to plaintiff no.2. The learned trial judge,however, recorded a finding that it is proved that the defendant no.1 is the tenant of survey no. 303, 306/1,493, 494 and 306/2 and the defendant no.1 has become the purchaser of these lands by virtue of the decision of the revenue authorities. As far as survey no. 393 with which we are concerned in the present appeal, the learned trial judge recorded a finding that the defendant no.1 sold survey no. 393 to defendant no. 4(appellant) without the consent of the plaintiff no.1 and the defendants no.2 and 3. In view of the fact that the defendant no.1 already became the tenant of survey no. 306/2, the learned judge was of the opinion that the defendant no.1 could not have purchased the said land out of the sale consideration of survey no. 393. The learned judge specifically recorded a finding that the appellant was not the bonafide purchaser for value of survey no. 393. In view of the aforesaid findings, the learned judge was pleased to pass the judgment and decree as stated in the earlier part of the judgment.

7. Mr.S.K.Jhaveri,learned Counsel appearing for the

appellant submitted that the appellant purchased the survey no. 393 in the year 1964 from the defendant no.1 who was cultivating the same since 1957 with the knowledge and consent of the plaintiffs and, therefore, even if the defendant no.1 not being declared as a tenant with respect to the said land, the appellant will be entitled to hold the lands by adverse possession. In the submission of Mr.Jhaveri, the period of possession by the defendant no.1 is required to be clubbed together with the possession of the appellant while deciding the question of adverse possession. Mr.Jhaveri, therefore, submitted that the defendant no.1 being in possession of the land bearing survey no. 393 since 1957 and having sold the same in the year 1964 and the suit having filed in the year 1971, the appellant has become the owner of the said land by virtue of adverse possession. Now, the question of adverse possession being especially a question of fact is not only required to be pleaded but also to be proved. Neither the defendant no.1 nor defendant no. 4(appellant) in their written statement have pleaded the case of adverse possession and, therefore, obviously no issues for the same are framed. The defendants no. 1 to 4 as well as the appellant have not entered the witness box. The defendant no.1 has claimed to be the tenant of other survey numbers except survey no. 393. In view of this, there is nothing on record to show that the survey no. 393 remained in possession of the defendant no.1 from 1957 till 1964 when he sold the same to the appellant.

8. It is the case of the defendant no.1 that the general power of attorney was not given in the year 1957, but it was given before that and in the year 1957, when the plaintiff no.1 came to India, at that time,these agricultural lands were handed over to him on crop sharing basis and so he was rightly declared as a tenant. The defendants no. 2 and 3, in their written statement Ex. 38, have supported the written statement of the defendant no.1. They have stated in para 4 that the defendant no.1 was cultivating his land prior to 1951 on crop sharing basis. However, in view of the fact that the general power of attorney was given to the defendant no.1, the plaintiffs have neither produced the original power of attorney nor have they proved that such power of attorney was given to the defendant no.1 and, therefore, without the general power of attorney on record,it is not possible to decide as to what were the contentions in the general power of attorney and in which year this power of attorney was given to the defendant no.1. In view of the fact that the defendant no.1 has been declared tenant with respect to all the lands except survey no. 393 and

in absence of the general power of attorney on record, it is not possible to hold that the defendant no.1 was managing and cultivating the said land for and on behalf of the plaintiffs and, therefore, the period from 1957 to 1964 when the said land was sold to the appellant cannot be included for the purpose of considering the question of adverse possession.

Mr. Jhaveri placed reliance on the decision rendered by Privy Council in the case of Hafiz Mohammad Fateh Nasib Vs. Sir Swarup Chand Hukum Chand,AIR 1948 PC 76. Considering the facts of the case, Their Lordships of Privy Council were of the opinion that an adverse possession of the plaintiff and his predecessor-in-title has been proved for the requisite period. In other words, the period of predecessor-in-interest can be taken into consideration for deciding the case of adverse possession. There cannot be any dispute with regard to the principle laid down in the said judgment. However, considering the facts on hand, in my opinion,the said judgment cannot help the case of the appellant. In the instant case, it is an admitted position that the survey no. 393 which is included in Schedule A is sold by the defendant no.1 to the appellant. In form no. 6 i.e. Record of Rights, it is mentioned that the survey no. 393 was sold by Ratansing Narsing, the general power of attorney holder of plaintiff no.1 and the defendant no.3 to the appellant on 3.9.1964 for Rs. 1806/-. Except the said entry, no document i.e. sale deed is produced on the record of the case. In absence of any registered sale deed, the appellant cannot be held to be a lawful purchaser of survey no. 393 and, therefore, the question of applicability of section 53-A of the Transfer of Property Act will not arise.

Assuming that the appellant was cultivating the land since 1964, however, when the suit is filed in the year 1971, there is no question of his claiming possession of the land by adverse possession. In this view of the matter, the learned trial judge was justified in holding that the survey no. 393 is a joint family property and, therefore, liable to be partitioned.

9. Mr.Jhaveri next contended that even though he has raised a specific contention regarding the tenancy of the land in the written statement, Civil Court ought to have referred it to the Mamlatdar. After inviting my attention to the provisions of section 4 of the Bombay Tenancy and Agricultural Lands Act,1948(herein after referred to as'the Act'), Mr. Jhaveri contended that the appellant was lawfully cultivating the land bearing

survey no. 393 belonging to the plaintiff who is deemed to be a tenant especially when the land has not been cultivated personally by the plaintiffs. In the submission of Mr. Jhaveri, the appellant being not the member of the owner's family is a deemed tenant within the meaning of section 4(a) of the Act and, therefore, under section 85 of the Act, the Civil Court has no jurisdiction to settle, decide or deal with any question which is required to be settled, decided or dealt with by the Mamlatdar or the Tribunal. Mr.Jhaveri, therefore, submitted that under section 85-A of the Act, the Civil Court ought to have made reference to the revenue authorities. He has placed reliance on the decision of this Court in the case of Joshi Chhaganlal Garbaddas Vs. Raising Khodasing, 27(1) GLR 69 wherein this Court has ruled that the question regarding prima facie case of tenancy does not arise for consideration of the Civil Court. If an issue arises, which is required to be decided by a tenancy court, the Civil Court has no jurisdiction to decide the same even in going into that question.

Reliance is also placed on the decision of the apex Court in the case of Kanaksinh B.Parmar Vs. S.B.Makwana, 36(2) GLR 1409. The apex Court, in the said decision, took a view that the provisions of Bombay Tenancy and Agricultural Lands Act give no scope or room to think that the plea of tenancy if raised in a suit in a civil court, the same could be decided by the civil court.

Section 4(a) and section 85 and 85-A read as under:-

"4. Persons to be deemed tenants: A person lawfully cultivating any land belonging to another persons shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not---

(a) a member of the owner's family, or

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"85. Bar of jurisdiction---(1) No Civil Court shall have jurisdiction to settle, decide or deal with any question (including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which is by or under this Act required to be settled, decided or dealt with by

the Mamlatdar or Tribunal, a Manager, the Collector or the (Maharashtra Revenue Tribunal) in appeal or revision or the (State)Govrnment in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the State Government made under this Act shall be questioned in any Civil or Criminal Court.

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85A: Suits involving issues required to be decided under this Act----(1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the 'competent authority') the Civil Court shall stay the suit and refer such issues to such competent authority for determination.

(2) On receipt of such reference from the Civil Court,the competent authority shall deal with and decide such issue in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such court shall thereupon dispose of the suit in accordance with the procedure applicable thereto. "

On plain reading of section 85,it is clear that the Civil Court is bound to refer the issue regarding tenancy to Mamlatdar and cannot insist that the party must establish prima facie case. That does not mean that as and when such a plea is raised, the Court, without applying mind must refer the same to the Mamlatdar. Before referring the issue to be decided or to be dealt with by the revenue authorities, the civil court is required to frame the issues on the basis of particulars regarding the claim of tenancy. The party who claims to be the tenant is under an obligation to furnish the particulars so that the civil court can form an opinion that the tenancy is created in favour of a party which is required to be decided by the Competent Authority. Those particulars can be of the time when the tenancy was created; the person by whom it was created and the terms on which it was created. This is the minimum requirement for the party who claims tenancy. If this is not insisted upon, an unscrupulous party may make a frivolous claim and retain the possession of the land to which such

party is not entitled for years to come, after successfully getting the issue referred to the Mamlatdar. Thus, when a claim of tenancy is made in written statement without supplying any particulars, civil court cannot be expected to refer to the same,just by asking, in a routine manner.

10. Now, let us see the averments made by the appellant in the written statement claiming the tenancy of the land. In the written statement, he has stated that he is the tenant of the land because the land was handed over to him by the general power of attorney holder of the present plaintiffs. As observed above, the plaintiffs have failed to prove the general power of attorney in favour of defendant no.1. Therefore, the defendant no.1 had no authority to transfer the land in favour of the appellant. In absence of any valid title in favour of the defendant no.1, there will not be any better title for retaining the land in question by the appellant. Therefore,it cannot be contended by the appellant that he is in lawful possession of the land in question. Once the appellant fails to establish that he is lawfully cultivating the land belonging to the plaintiffs, he cannot take recourse to section 4 of the Act. In absence of any material produced by him as to the time when the tenancy was created, which of the plaintiff had created and the terms on which it was created, in my opinion, on the basis of an absolutely vague plea raised in the written statement, there was no question of making reference under section 85A of the Act by the learned trial judge. In my opinion, a party cannot be permitted to raise an inconsistent stand claiming ownership as well as tenancy of the same land. In absence of any material to justify reference before the revenue authority, in my view, no interference is called for in the impugned judgment.

There being no substance in this appeal, it is dismissed with costs. Interim relief granted by this Court stands vacated.

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